Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

WALTER JEFFERSON,

Petitioner,

vs.

CAPTAIN D'S RESTAURANT a/k/a SHONEY'S Inc. and TPI RESTAURANTS, Inc.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is there a denial of due process accorded under the United States Constitution, if the Plaintiff is denied an opportunity to file a lawsuit a third time, if the controlling statute is worded as is Tenn. Code Ann. 28-1-105, and each re-filing is within one year of the most recent dismissal, but the second re-filing is over a year after the first dismissal?

LIST OF PARTIES

This application appeal arises out of an appeal. The appeal arose after a lawsuit, filed in the Shelby County Circuit Court, State of Tennessee, 30th Judicial District at Memphis, was dismissed. The Plaintiff/Appellant/Petitioner is Walter Jefferson. The trial-court suit was filed by Plaintiff Walter Jefferson, against Defendant/Appellees, Captain D's Restaurant, a/k/a Shoney's Inc., and TPI Restaurants, Inc. It is possible that both Defendants/Appellees (possibly referred to in these pleadings as Defendants) are the same entity.

This lawsuit is the re-filing of a suit filed and voluntarily dismissed (non-suited), which in turn, was the re-filing of a prior suit, filed and dismissed without prejudice.

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CITATION TO REPORTS

None of the relevant orders or opinions in this case were published in reporters, either official or otherwise.

BASIS FOR JURISDICTION

The order for summary judgment (concerning the judgment in question) was entered in the Shelby County Circuit Court on August 19, 1999 (Exhibit "D" of Appendix). The decision by the Tennessee Court of Appeals affirming the decision of the trial court was entered on August 16, 2000 (Exhibit "A" of Appendix). The decision by the Supreme Court of Tennessee to deny the application for permission to appeal was filed on March 5, 2001 (Exhibit "E"of Appendix). This Petition for Writ for Certiorari is filed within the time required after the Tennessee Supreme Court denial. The jurisdiction of this Court to review this petition for certiorari rests upon Section 1257 of the Judicial Code (28 U.S.C., Section 1257).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Plaintiff submits that the relevant constitutional sections are the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution (see Exhibits "F" and "G" to the Appendix). The relevant statute is the Tennessee saving statute, Tennessee Code

Annotated 28-1-105 (see Exhibit "H"). The relevant rule is Tennessee Rule of Civil Procedure 41.01 (see Exhibit "I").

STATEMENT OF THE CASE

Comes now the Plaintiff, Walter Jefferson, and respectfully submits that a writ of certiorari issue to review the denial of the Tennessee Supreme Court to hear this case on March 5, 2001, the affirmation of the trial court's decision by the Tennessee Court of Appeals on August 16, 2000, and the dismissal of the trial-court case by the Shelby County Circuit Court on August 19, 1999.

On July 18, 1991, the Plaintiff slipped, fell, and suffered physical injury at the Defendant's restaurant.

On June 5, 1992, Plaintiff filed a Complaint in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. The lawsuit named Captain D's Restaurant a/k/a Shoney's Inc., and TPI Restaurants, Inc. *Id.*

On June 21, 1994, an Order of Dismissal without prejudice (see Exhibit "B" of Appendix) was entered. On September 23, 1994, the Plaintiff filed his second complaint, essentially based on the same allegations as the first action. On June 23, 1997, the Court entered an Order of Voluntarily Dismissal without Prejudice (non-suit) (Exhibit "C"). On June 17, 1998, the Plaintiff filed the third complaint, once again based on similar allegations as the first two actions.

On May 14, 1999, the Defendants filed a Motion for Summary Judgment. On about the same day, the Defendant submitted to the trial Court Judge Memorandum in

Support of Defendants' Motion for Summary Judgment. This Memorandum argued that (1) the third filing was both outside of the statute of limitations for this type of action, and (2) the third filing was more than a year after the first dismissal. *Id.* Therefore, according to the Defendant the Plaintiff could not legitimately re-file under the savings statute, of Tenn. Code Ann. 28-1-105 (Supp. 2000).

The Plaintiff countered by asking that this Motion be denied. The Response referred the trial court to the accompanying "Memorandum in Support of Response to Motion for Summary Judgment", submitted to the trial Court about the same time. In this Memorandum, the Plaintiff countered the Defendant's claims by citing to the germane part of the statute, noting that "[I]t is not obvious from the language of the statute that the year deadline is from the taking of the first nonsuit" . . . and by stating that "[b]ecause of the literal meaning of Tenn. Code Ann. 28-1-105, the very clear meaning of Tenn. R. Civ. Pro. Rule 41.01, general equity, and the announced policy of a liberal interpretation of the statute, the Plaintiff asks that the Motion for Summary Judgment be dismissed". The Court granted the Motion for Summary Judgment on August 19, 1999.

On, or about September 16, 1999, the Plaintiff filed its Motion to Appeal. Plaintiff's brief was filed on, or about, January 18, 2000. In it, the Plaintiff raised the issue of a federal question (see Exhibit H of Appendix, pertinent parts of Plaintiff's brief before the Court of Appeals). The Defendant(s)/Appellant(s) filed their brief in February, 2000. On, or about, March 8, 2000, the Plaintiff's reply brief was filed.

On May 17, 2000, oral argument was heard by the Court of Appeals at Jackson. On August 16, the Court of Appeals decision was filed. It upheld the finding of the trial court.

Plaintiff then petitioned the Tennessee Supreme Court to hear the case. Application was filed October 18, 2000. This request was denied, on March 5, 2001.

Recap of Pertinent Dates:

Date of Incident	Statute of Limitations	Filings	Dismissals (without prejudice)
7-18-91			
		6-5-92	
	7-18-92		
			6-21-94
		9-23-94	
			6-23-97
		6-17-98	

ARGUMENT

A. Introduction

In Tennessee, a plaintiff has the right to two dismissals and two subsequent re-filings, if these dismissals are without prejudice, and if each re-filing is within one year of the most recent dismissal.

Tennessee courts hold that, generally, all re-filings must be within one year after the first dismissal. But this contention is unconstitutional.

B. Constitutional Issues

The saving statute, as interpreted by Tennessee courts is unconstitutional. The interpretation violates the guarantees of due process in the Fifth and Fourteenth Amendments of the United States Constitution. It would lead plaintiffs into unwittingly denying themselves an opportunity to litigate cases.

"A statute is unconstitutionally vague if it does not give a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited.' " *Terry v. Reno*, 101 F.3d 1412, 1421 (D.C. Cir. 1996), quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The United States Supreme Court has found against denying a litigant the right to a serious opportunity for a hearing: "[H]aving made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 n.5 (1982).

In the instant case, therefore, if (a) the current interpretation is so misleading that the average person cannot determine what it means, if (b) the Plaintiff was, thus, deprived of an opportunity to be heard in court, and (c) the Tennessee Rules of Civil Procedure limits the number of re-filings subsequent to non-suits, and (d) there is no state interest in the statute; then the current interpretation is unconstitutional.

A reasonable construction of a statute, which preserves the statute's constitutionality, is preferable to an

unconstitutional construction. *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council et al.*, 485 U.S. 568, 575 (1988).

C. Tennessee Rules of Civil Procedure

Tennessee Rules of Civil Procedure took effect in 1971 (Robert Banks, Jr., and June F. Entman, *Tennessee Civil Procedure*, Section 1-2(b) at 4 (1999) (See Exhibit "K" of Appendix)) state, in pertinent part, that:

> (1) Subject to . . . any statute . . . the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties . . .
>
> (2) Notwithstanding the provisions of the preceding . . . notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has twice dismissed in any court an action based on or including the same claim.

Tenn. R. Civ. P. 41.01 (1999).

For purposes of re-filing, a dismissal, based on failure to prosecute, is treated in the same manner as a nonsuit. " . . . [I]t makes no difference whether the inconclusive dismissal or dismissal not on the merits was a voluntary nonsuit or a dismissal without prejudice for want of prosecution" *Payne v. Matthews*, 633 S.W.2d 494, 496 (Tenn. Ct. App. W.D. 1982).

The rule appears to suggest that the Plaintiff is entitled to two voluntary dismissals. And if the wording of the rule is not sufficiently clear, the Court concurs: "Rule 41.01 T.R.C.P. gives a litigant the right to take two voluntary nonsuits" *Id.*

D. Tennessee Code Annotated

The rule includes the words: "[s]ubject to . . . any statute . . . " The relevant statute in this case is Tennessee Code Annotated 28-1-105 (called the "saving statute", *Payne v. Matthews*, 633 S.W.2d 494 (Tenn. Ct. App. 1982)). Section (a) of the statute reads, in pertinent part:

> If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested or reversed on appeal, the plaintiff, or the plaintiff's representative and privies, as the case may be, may, from time to time commence a new action within one (1) year after the reversal or arrest.

Tenn. Code Ann. 28-1-105 (Supp. 1998)

The statute, like the rule, indicates that the Plaintiff was within his rights, and timely re-filed his suit both times. Both the initial lawsuit and the first re-filing were done "within the time limited by a rule or statute of limitations": the initial lawsuit, filed within the regular (one-year) statute of limitations required for a personal injury case; the first re-filing was filed within the one

year following the dismissal (without prejudice) of the initial lawsuit (a re-filing expressly provided for in Tenn. Code Ann. 28-1-105).

All dismissals in this case were dismissals without prejudice. Neither the first nor the second dismissal would have extinguished the Plaintiff's right of action. Therefore, the Plaintiff was within his rights in re-filing again on June 17, 1998 (the third filing, second re-filing). The third filing was legitimate and timely.

Note that the Tennessee Code states that the Plaintiff "may . . . commence a new action within one year of the reversal or arrest", ***not*** that the Plaintiff "may . . . commence a new action within one year of the ***first*** reversal or arrest". See Tenn. Code Ann. 28-1-105

Further, the part of Section (a) of the saving statute quoted *supra*, includes the words: "[I]f the action is commenced within the time limited by a rule or statute of limitation, but . . . the judgment or decree is rendered in favor of the plaintiff, and is arrested, *or reversed* on appeal, the plaintiff . . . may . . . commence a new action within one . . . year after the reversal or arrest." Tenn. Code Ann. 28-1-105 (italics ours).

Consider the following scenario:

(a) A party suffers a personal injury in 1979, and:

(b) files suit in 1980, within the one-year statute of limitations.

(c) Trial is held in 1982, and the Plaintiff prevails.

(d) The following year, 1983, the Court of Appeals reverses the trial court decision.

(e) Plaintiff timely re-files in 1984, relying on the one-year window provided by the saving statute.

(f) In 1987, Plaintiff prevails at trial (again).

(g) In 1988, the Court of Appeals reverses the trial court's decision (again).

(h) In 1990, the Plaintiff re-files again. This is the third filing, one that transpired over a year after the first reversal.

Was it the legislature's intent that the Plaintiff be barred from re-filing? According to the logic that brought about the trial-court dismissal (and appellate decision) in the instant case, the answer would be ***"YES"!*** Yet this would constitute an obvious violation of a constitutional right to preserve one's suit. The dismissal in the instant case is based on similar reasoning.

E. Case-Law Interpretation

Tennessee case law holds that "it has long been held that after the taking of any non suit to the original action, any additional suits would have to be filed within one year of the first non suit to be within the purview of T.C.A." Section 28-1-105. *Hunt v. Shaw*, 946 S.W.2d 306, 308 (Tenn. App. 1996); quoting *Payne v. Matthews*, 633 S.W.2d 494 (Tenn. App. 1982).

The interpretation of the "saving" statute cited in the above-referenced case contradicts the plain meaning of the relevant statute and rule.

True, the relevant rule of civil procedure acknowledges being subject to statute. But when a statute is, at best, ambiguous, a reasonable assumption is that there would be no inconsistencies between the statute and the rule.

Besides, the statute is not highly ambiguous. It is fairly clear. The case law contradicts the meaning of the statute.

Scholarly authority notes the problem in this interpretation.

"Not surprisingly, parties and their attorneys often misconceive the extent of their right to take a nonsuit and either exercise the right after the time period has advanced beyond the savings statute or exercise the right in disregard of the only-two-dismissals-without-prejudice provision in Rule 41.01." Robert Banks, Jr. and June F. Entman, *Tennessee Civil Procedure*, Section 9-2(b) 648 (1999) (See Exhibit "K" of the Appendix).

And:

"How many "free" nonsuits can a Tennessee lawyer take? Rule 41 says two . . . Don't believe it; it's probably a lie." Donald F. Paine, *Sex, Lies and Nonsuits*, 29 Tenn. Bar Jour., No. 5; 17 (1993) (Exhibit "L").

The current interpretation of the law is based neither on the literal wording of the saving statute, the literal wording the Tennessee Rules of Civil Procedure, or relevant contemporary policy arguments. It rests on case precedent, passed down from generation to generation, the policy justification for which no longer makes sense. Already noted was a cite to *Hunt v. Shaw*, 946 S.W.2d 306,

307 (Tenn. App. 1996); in turn citing to *Payne v. Matthews*, 633 S.W.2d 494 (Tenn. App. 1982). But *Payne*, in announcing – actually repeating – this interpretation, merely cites (*Id.* at 495-96). *Reed v. Cincinnati N.O. & T.P. Railroad Co.*, 190 S.W. 458 (Tenn. 1916).

Reed cites, in its discussion of the non-suit statute, *Id.* at 458-59, to the case of *Memphis & Charleston Railroad Co. v. Pillow*, 56 Tenn. (9 Heisk.) 248 (Tenn. 1872). In the *Memphis* case, a Plaintiff obtained a voluntary dismissal, and re-filed. Defendant pleaded the statute of limitations as a bar to re-filing. The Court found "that the plea of a statute of limitations of one year is a perfect defense against this suit, unless it falls within the savings provisions of" what would be called today the saving statute or the non-suit statute. *Id.* at 251. The Court determined that "[I]t was held, properly, as we think . . . that the plaintiff might, within a year, commence a new suit, because the judgment rendered against him was not so rendered upon any ground concluding his right action". *Id.* at 252.

Apparently, the Defendant argued, in *Memphis & Charleston Railroad Co. v. Pillow*, that Plaintiff's re-filing could lead to a continuous chain of re-filings. This is what the plain meaning of the statute would allow. Consequently, Defendant argued against the literal meaning of the statute, prohibiting any re-filing outside of the statute of limitations. This argument would defeat the plain meaning of the statute, which is little more than the interpretation that the Defendant argues for in the instant case. The Court dismissed the Defendant's argument by determining:

> [t]he new action in such case must be brought within one year after the termination of the action, which was commenced within the time limited by law for the bringing of such action, so that the indefinite succession of suits upon the same cause of action can not result from the construction given to the act, as suggested by counsel. The payment of costs is ordinarily a sufficient restraint upon the reckless or wanton institution of suits.

Id.

The last sentence is correct; the expenses associated with filing would generally be a deterrent to endless re-filings. The remainder of the quote is not supported by the wording of the statute. But this issue was, at the time, academic, as that particular finding was *dicta*. Apparently, *Memphis & Charleston Railroad v. Pillow* did not cover a case repeatedly dismissed and re-filed. The case had only been non-suited and re-filed once.

Reed v. Cincinnati N.O. & T.P. Railroad Co., (190 S.W. 458 (1916)), was similar to the instant case. The Court ruled that Plaintiffs must (generally) re-file within a year of the dismissal without prejudice. *Reed* cited the *dicta* in *Memphis & Charleston Rail. v. Pillow. Reed*, 190 S.W.2d at 458-59.

Reed offers policy justification. *Reed's* position is that a measure is necessary to prevent continuous re-filings. "[T]he act should be given a liberal construction . . . but . . . we do not think its purpose was . . . unending litigation upon . . . same cause of action . . . at the option of . . . plaintiff." *Id.* at 459.

Attorneys, plaintiffs, and the judicial system would have been better served, and less confused, if the legislature (the body responsible for the saving statute) had not altered the law. But *Reed* case makes policy sense. A defendant should not be plagued by endless dismissals and re-filings (though the legislature was more qualified to deal with this issue than the courts).

Payne v. Matthews, 633 S.W.2d 494 (Tenn. App. 1982), was decided after the Tennessee Rules of Civil Procedure first went into effect (1971). *Payne* dealt with a similar situation as the instant case. Plaintiff's attorney argued "that the dismissal of this lawsuit by the trial court is in contradiction to Rule 41 T.R.C.P., which bars a cause of action only on the taking of a third voluntary nonsuit." *Id.* at 495. The Court disagreed, determining that "T.C.A. 28-1-105 addresses itself to *time* while Rule 41.01 of the . . . Rules . . . addresses itself to *the number* of dismissals . . . that can be taken. . . . It is clear . . . for a suit to survive, it must have been filed within one year of the date of dismissal of the original action."

F. Case Law Dealing With Interpretation Of Tenn. Code Ann. 28-1-105

The saving statute, Tenn. Code Ann. 28-1-105, is to be liberally construed. *Kee v. Sheltered Insurance*, 852 S.W.2d 226, 228 (Tenn. 1993).

G. Case Law Dealing With Conflict Between Rule And Statute

"Conflicts between provisions of the Tennessee Rules of Civil Procedure and provisions of the Tennessee Code which cannot be harmoniously construed will be resolved in favor of the Tennessee Rules of Civil Procedure". *Mid-South Pavers v. Arnco Construction, Inc., et al.*, 771 S.W.2d 420, 422 (Tenn. Ct. App. W.D. *perm. app. den.* 1989).

H. North Carolina Law

The saving statute is of North Carolina origin (Donald F. Paine, *Nonsuits Don't Necessarily Save You*, 25 Bar Jour., No. 1 28 (1989) (Exhibit "L" of the Appendix)).

North Carolina case law has found:

> Interpreting our former statute, our Supreme Court held that under its provisions a plaintiff had the right to bring an unlimited series of actions based upon the same claim, provided he brought each new action within one year of the dismissal of the immediately preceding action. . . . Recognizing that this right "was sometimes abused by action after action being instituted after a cause was nonsuited," the Court held that "the only remedy was a bill of peace." *Parrish v. Uzzell*, 255 S.E.2d 219, 222 (N.C. Ct. App. 1979).

And while the statute in question was repealed, the North Carolina Court of Appeals held that the wording of the statute was incorporated into the relevant Rule and was still good law. *Id.*

Tennessee defendants would not suffer from the same problem of endless filings that North Carolina defendants might because of the limit to non-suits clearly placed on Plaintiffs by the Tennessee Rules of Civil Procedure.

I. DISCUSSION

In the instant case, therefore, the current interpretation is unconstitutional. It is so misleading that the average person cannot determine what it means. The Plaintiff was, thus, deprived of an opportunity to be heard in court, and the Tennessee Rules of Civil Procedure limits the number of re-filings subsequent to non-suits, and there is no state interest in the statute.

The policy that re-filing, to be effective, must be within one year of the initial dismissal is not supported by Tenn. Code Ann. 28-1-105, or by Tenn. R. Civ. P. 41.01 (1999). This policy, however, was adopted because the Court was concerned about the unfairness posed to Defendants by repeated dismissals and re-filings. But, as this policy is not supported by the wording of the statute, it is not reasonably possible for the average lawyer (or litigant) to discern the correct interpretation, rendering the statute unconstitutional.

Moreover, due to the Tennessee Rules of Civil Procedure, adopted in 1971, the problem that prompted this policy no longer exits. Countless re-filings are not possible. Three (voluntary) dismissals constitute a bar to further re-filings. Even for a policy point of view, the current interpretation is unnecessary.

The Tennessee Supreme Court found that the relevant statute should be liberally construed. Knowing this would naturally lead one to believe that the statute would be interpreted liberally on the issue concerning the deadline of re-filing – the issue in the instant case. This underscores how difficult the current interpretation is to glean even by an attorney familiar with case law – further supporting the arguments for finding the current interpretation unconstitutional.

Assume, *arguendo,* that case law interprets Tenn. Code Ann. 28-1-105 correctly. A plaintiff (or Plaintiff's attorney) would legitimately (and reasonably) believe that Tenn. R. Civ. P. 41.01 superseded Tenn. Code Ann. 28-1-105. Since the rule was enacted after the statute, and since the rule does not mention the statute (it simply acknowledges being "subject to statute"), the average reasonable attorney would assume that the rule and statute contradict and that the rule was meant to supersede the statute.

The difficulty in the average reasonable attorney uncovering the "correct" interpretation of the statute further argues for finding the present Tennessee case law on this (particular) subject unconstitutional.

Finally, the hypothetical scenario, victories twice reversed by the appellate court, demonstrates the absurdity of the current interpretation. According to precedent, this plaintiff would find it impossible to revive his suit (assuming the dates and time frames mentioned in the scenario). The law should be reinterpreted out of justice to this plaintiff (in the hypothetical situation), if not for the plaintiff in the instant case. Certainly the Plaintiff in

that hypothetical situation would be a victim of a violation of due process, as is the petitioner in the instant case. Finally:

> . . . [A] bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law . . . it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people.

William Blackstone, Commentaries on the Laws of England, *45-6.

CONCLUSION

Based on the foregoing facts, law, and argument, the Plaintiff respectfully moves this Honorable Court to hold as follows:

1. Grant, and accept, this petition for certiorari, to review the judgment in the above-discussed case.

2. Award any other relief, either in law or in equity to the Plaintiff, to which he may be entitled.

Respectfully submitted,

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APPENDIX

EXHIBIT "A"

In the Court of Appeals of Tennessee

AT JACKSON

May 2000 Session

WALTER JEFFERSON v. CAPTAIN D'S RESTAURANT, aka SHONEY'S INC., and TPI RESTAURANTS, INC.

A Direct Appeal from the Circuit Court for Shelby County
No. 95327 T.D. The Honorable George H. Brown, Jr., Judge

No. W1999-00574-COA-R3-CV

(Filed Aug. 16, 2000)

In this personal injury action plaintiff timely filed suit, which was subsequently dismissed for failure to prosecute. Another suit was commenced within one year of the first dismissal. This suit was voluntarily nonsuited at a later date. A third suit was commenced within one year of the voluntarily nonsuit, but more than one year from the date of the first dismissal. The trial court granted summary judgment on the ground that the suit was barred by the statue of limitations. Plaintiff has appealed.

Tenn.R.App.R. 3 Appeal as of Right;
Judgment of the Circuit Court Affirmed.

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Larry A. Weissman, Memphis. For Appellant, Walter Jefferson

William B. Walk, Jr., Memphis. For Appellees. Captain D's Restaurant, et al

OPINION

Plaintiff/appellant, Walter Jefferson, appeals the order of the trial court granting summary judgment to defendant/appellee. Captain D's Restaurant a/k/a Shoney's Inc., and TPI Restaurants, Inc. (hereinafter Restaurant).

The facts are not in dispute. On June 5, 1992, plaintiff filed a complaint alleging that on July 18, 1991, while in defendant's restaurant, he slipped on a slippery substance which resulted in injury. On June 2, 1994, the trial court dismissed the case for failure to prosecute. Plaintiff filed a second complaint on September 23, 1994, with essentially the same allegations as the original complaint. A voluntary nonsuit was taken on the second complaint by order entered June 23, 1997. The case before us was filed on June 17, 1998, almost four years after the dismissal of the first action on June 21, 1994. Defendant filed a motion for summary judgment on the grounds that the action was barred by the applicable statute of limitation. The trial court granted defendant's motion on August 19, 1999, and plaintiff appeals.

The only issue for review is whether the trial court erred in granting summary judgment to defendant.

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine

issues of material fact and that the moving party is entitled to a judgment as a matter of law. Ten. R. Civ. P. 56.03. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence.

Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). In this case, there is no dispute concerning the pertinent data, and the only question is whether defendant is entitled to summary judgment as a matter of law. Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. *Bain*, 936 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. *Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn. 1997).

Plaintiff contends that the trial court erred in granting the defendant's motion for summary judgment. He argues that a plaintiff has the right to two dismissal and two subsequent re-filings, if these dismissal [sic] are without prejudice, and if each re-filing is within one year of the most recent dismissal. Plaintiff concedes that case law exists contrary to his argument, but asserts that T.C.A. § 28-1-1-105 and Tenn. R. Civ. P. 41.01 have been misinterpreted.

Defendant contends that while Tenn. R. Civ. P. Rule 41.01 gives a litigant the right to take two voluntary nonsuits, that right is subject to the provisions of any statute, namely T.C.A. 28-1-105. Defendant correctly relies on *Payne v. Matthews*, 633 S.W.2d 494 (1982), which states in part:

> The Tennessee saving statute, formerly T.C.A. Sec. 28-106, now T.C.A. Sec. 28-1-105, has been considered several times by our courts. It has long been held that after the taking of any nonsuit to the original action, any additional suits would have to be filed within one year of the first nonsuit to be within the purview of T.C.A. Sec. 28-1-105. *See, Reed v. Cincinnati, N.O. & T.P. Railroad Co.*, 136 Tenn. 499, 190 S.W. 458 (1916). While many of these cases deal with consecutive voluntary nonsuits, it is clear from the wording of the statute that its scope is broader than that. T.C.A. Sec. 28-1-105 [now 28-1-105(a)] reads as follows:
>
> **28-1-105. New action after adverse decision.** – If the action is commenced within the time limited by a rule of statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff or his representatives and privies, as the case may be may, from time to time, commence a new action within one (1) year after the reversal or arrest.
>
> * * *

This Court has addressed the question of the possible conflict between T.C.A. Sec. 28-1-105 and Rule 41.01 of the Tennessee Rules of Civil procedure in the case of *Marie R. Ellison, et al v. Browning-Ferris, et al* in a unreported opinion by Judge Summers, filed December 15, 1980. Judge Summers writes for the court:

> The next question to be answered by this court is whether Rule 41.01 of the Tennessee Rules of Civil Procedure enlarges the time in which a party can refile after a voluntary nonsuit has been taken.
>
> Rule 41.01 clearly states that a plaintiff shall have a right to take a voluntary nonsuit or to dismiss an action without prejudict (sic) subject to the provisions of Rule 23.03, Rule 66. "Except when a motion for summary judgment made by the adverse part is pending," and of *any statute.* Rule 41.01 limits the number of dismissals (nonsuits) that can be taken.
>
> We must therefore hold that T.C.A. Sec. 28-1-105 addresses itself to *time* while Rule 41.01 of the Tennessee Rules of Civil Procedure addresses itself to *the number* of dismissals (nonsuits) that can be taken. There is no conflict between the statute and the rule.

Payne v. Matthews, 633 S.W.2d at 495-96.

Clearly, the instant case was not timely filed. It was outside the one year period of limitations applicable to personal injury actions. *See* T.C.A. § 28-3-104 (1999 Supp.). Further, since it was filed more than one year after the dismissal for failure to prosecute on June 21, 1994, the plaintiff cannot rely on the savings statute to

validate his complaint. *Payne*, at 145; *Hunt v. Shaw*, 946 S.W.2d 306, 307-308 (Tenn. Ct. App. 1996).

Accordingly, the order of the trial court granting summary judgment to the defendant is affirmed. Costs of appeal are assessed against appellant, Walter Jefferson.

/s/ W. Frank Crawford
W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

EXHIBIT "B"

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

WALTER JEFFERSON,

Plaintiff,

vs. No. 46562-6 T.D.

TPI RESTAURANTS, INC.
d/b/a CAPTAIN D'S RESTAURANT,

Defendants.

ORDER OF DISMISSAL WITHOUT PREJUDICE

This cause came to be heard on Defendant's Motion to Dismiss for failure to prosecute. Based on the pleadings, statements of counsel and the entire record, this Court finds that Defendant's Motion is well taken and should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the matter be and the same is hereby dismissed without prejudice. The costs are hereby assessed against the Defendant.

GEORGE H. BROWN, JR.
JUDGE

Date: 6-21-94

APPROVED:

/s/ William B. Walk, Jr.
WILLIAM B. WALK, JR.,
#13989
Attorney for Defendants
80 Monroe – Suite 650
Memphis, Tennessee 38103
(901) 525-8776

A TRUE COPY ATTEST
CLINT CRABTREE, Clerk
/s/ M L [Illegible]

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via U.S. Mail, postage prepaid to Mr. John G. Montague, Attorney at Law, 191 Jefferson Avenue, Memphis, Tn 38103 and Walter Jefferson, 3170 Rendezvous, Memphis, TN 38118, this 31st day of JUNE, 1994.

/s/ William B. Walk, Jr.

EXHIBIT "C"

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

WALTER JEFFERSON,

Plaintiff,

v. No. 46562-6 T.D.

CAPTAIN D'S RESTAURANT,
a/k/a SHONEY'S INC., and/or
TPI RESTAURANTS, INC.,

Defendants.

CONSENT ORDER OF VOLUNTARY
NON-SUIT AGAINST SHONEY'S INC.

It appearing to the Court from statements of counsel that the plaintiff desires to take a voluntary non-suit in this cause as to the defendant, Shoney's, Inc.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiffs be and are hereby allowed to take a voluntary non-suit in this cause as to the defendant, Shoney's, Inc.

JANICE M. HOLDER
JUDGE By Interchange

DATE: 7-21-97

APPROVED:

/s/ David Aversa
DAVID AVERSA
Attorney for Plaintiff

A TRUE COPY ATTEST
CLINT CRABTREE, Clerk
/s/ [Illegible] D.C.

/s/ William B. Walk, Jr.
WILLIAM B. WALK, JR.
Attorney for Defendants
80 Monroe Avenue, Suite 650
Memphis, TN 38103
(901) 525-8776

EXHIBIT "D"

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

WALTER JEFFERSON,

PLAINTIFF,

VERSUS NUMBER: 95327-6 T.D.

CAPTAIN D'S RESTAURANT,
a/k/a SHONEY'S, INC. AND
TPI RESTAURANTS, INC.,

DEFENDANTS

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

This cause came to be heard on July 23, 1999 before Honorable George Brown, Judge of Division 6 of the Circuit Court of Shelby County, Tennessee, based upon defendants' Motion for Summary Judgment. Based on defendants' motion, memorandum of law, statement of counsel, and the record as a whole, the Court finds that defendants' motion is well taken and should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants' Motion for Summary Judgment be hereby granted.

GEORGE H. BROWN, JR.
JUDGE

DATE: 8-19-99

APPROVED:

/s/ William B. Walk, Jr.
WILLIAM B. WALK, JR.,
#13989
Attorney for Defendants

A TRUE COPY ATTEST
Jimmy Moore, Clerk
/s/ MLR D.C.

/s/ Larry A. Weissman
LARRY A. WEISSMAN
Attorney for Plaintifff

EXHIBIT "E"

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

WALTER JEFFERSON, Applicant v. CAPTAIN D'S RESTAURANT, a/k/a SHONEY'S INC., and TPI RESTAURANTS, INC., Respondent

Circuit Court for Shelby County
No. 95327 T.D. George H. Brown, Jr., Judge

No. W1999-00574-SC-R11-CV

ORDER

(Filed Mar. 05, 2001)

Upon consideration of the application for permission to appeal and the record before us, the application of Walter Jefferson is denied.

PER CURIAM

EXHIBIT "F"

AMENDMENT 5

Criminal actions – Provisions concerning – Due process of law and just compensation clauses. – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EXHIBIT "G"

AMENDMENT 14

§ 1. Citizenship – Due process of law – Equal protection. – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

§ 2. Representatives – Power to reduce apportionment. – Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

EXHIBIT "H"

28-1-105. New action after adverse decision – Contractual limitations periods. – (a) If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest. Actions originally commenced in general sessions court and subsequently recommenced pursuant to this section in circuit or chancery court shall not be subject to the monetary jurisdictional limit originally imposed in the general sessions court.

(b) In the case of a contract which limits the time within which an action arising out of such contract must be brought, if such action is commenced within the time as limited by the contract but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff; and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives or successors, as the case may be, may, from time to time, commence a new action within one (1) year after the nonsuit, dismissal without prejudice, reversal or arrest. [Code 1858, § 2755 (deriv. Acts 1715, ch. 27, § 6: 1819, ch. 28, § 3): Shan., § 4446; Mod. Code 1932, § 8572; T.C.A. (orig. ed.), § 28-106; Acts 1985, ch. 344, § 1: 1989, ch. 225, § 1.]

EXHIBIT "I"

RULE 41

DISMISSAL OF ACTIONS

41.01. Voluntary Dismissal – Effect Thereof. – (1) Subject to the provisions of Rule 23.05 or Rule 66 or any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.

(2) Notwithstanding the provisions of the preceding paragraph, a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has twice dismissed in any court an action based on or including the same claim. [As amended by order entered January 25, 1991, effective July 1, 1991, and by order adopted January 24, 1992, effective July 1, 1992.]

EXHIBIT "J"

IN THE COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN SECTION AT JACKSON

WALTER JEFFERSON,

Plaintiff/Appellant,

vs. NO. W1999-00574-COA-R3-CV

CAPTAIN D'S RESTAURANT,
a/k/a SHONEY'S Inc., and
TPI RESTAURANTS, Inc.,

Defendants/Appellees.

BRIEF OF PLAINTIFF/APPELLANT

WEISSMAN & ASSOCIATES
Larry A. Weissman (8527)
5118 Park Avenue
Suite 600
Memphis, Tennessee 38117
(901) 763-2134
Attorney for Plaintiff/Appellant

* * *

Federal law on this issue is essentially similar to state law. "[T]he 'law of the land' provision of Article I, [Section] 8 of the Tennessee Constitution has been construed as synonymous with the 'due process of law' provision of the Fifth and Fourteenth Amendments to the U.S. Constitution." *Buford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992). *Buford* also found that the Tennessee Supreme Court can "expand the minimal level of protection mandated by the federal constitution." *Id.* But regarding this issue, federal

authority basically arrives at the same conclusions as Tennessee authority.

"A statute is unconstitutionally vague if it does not give a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited.' " *Terry v. Reno*, 101 F.3d 1412, 1421 (D.C. Cir. 1996), quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (Exhibits N and O).

The United States Supreme Court has found against denying a litigant the right to a serious opportunity for a hearing: "[H]aving made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 n.5 (1982) (Exhibit "P").

In the instant case, the statute, if mandates what Tennessee courts have held, was misleading so that the average person cannot determine what it means. It deprived the Plaintiff of an opportunity to be heard in court. And as the Tennessee rules of Civil Procedure limits the number of re-filings subsequent to non-suits, there is no state interest in the statute.

When one (reasonable) interpretation renders a statute constitutional, and another renders the statute unconstitutional, the constitutional interpretation is usually preferable. *Blankenship v. Old Republic Insurance Co., Inc.*, 539 S.W.2d 23, 27 (Tenn. 1976).

The saving statute, as currently interpreted violates due process, both state and federal. This justifies reinterpretation.

* * *

Respectfully submitted,

WEISSMAN & ASSOCIATES

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EXHIBIT "K"

TENNESSEE CIVIL PROCEDURE

By

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* * *

§ 1-2(b). Rules Creation – The Tennessee Rules Enabling Acts – Discussion of *Tennessee Code Annotated* §§ 16-3-401 through 16-3-406.

The current Tennessee Rules of Civil Procedure were developed through a process authorized by the Tennessee General Assembly. The original version of the rules enabling act was passed in 1965,[7] subsequently amended in 1975,[8] and amended again in 1985.[9] The original rules went into effect on January 1, 1971.

* * *

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[7] Acts 1965, ch. 227, §§ 1-5.

[8] Acts 1975, ch. 376, § 1.

[9] Acts 1985, ch. 24, § 1. The 1985 amendment related to *Tennessee Code Annotated* § 16-3-404, which is concerned with the effective date of changes to the rules and the submission of the rules by the Supreme Court to the General Assembly.

Rule 41.01, thus, does not *protect or guarantee* a right to two voluntary nonsuits. To illustrate, assume that a plaintiff has filed a civil action in tort for personal injury against a defendant three months before the statute of limitations has expired. On June 25, two months after the statute of limitations has run, the plaintiff takes a voluntary nonsuit. The plaintiff then has one year to refile the action under the savings statute. Assuming he does refile within that time period, but takes a voluntary dismissal before the one year has expired, he still must refile before June 25 of the following year. Similarly, if he takes a voluntary nonsuit after June 25 of the following year, he will find that his action is barred by the statute of limitations even though he has taken only two voluntary dismissals.[32]

The law is not settled as to when the voluntary nonsuit becomes effective for purposes of triggering the one-year period provided in the savings statute, although the weight of authority suggests that it begins with the entry of a court order following the plaintiff's notification of the court and the parties of the decision to nonsuit.[33] In

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[32] *See* Ford v. Turley, No. 02A01-9108-CV-00159, 1992 Tenn. App. LEXIS 490, 1992 WL 120237 (Tenn. App. W.S. June 5, 1992); Paine, *The Category of Tough: Nonsuits III*, 34 Tenn. B.J. 16 (Sept./Oct. 1998).

[33] *See* Rickets v. Sexton, 533 S.W.2d 293, 294 (Tenn. 1976) ("While plaintiff is master of his suit and may dismiss at his pleasure before trial, and without the concurrence of the trial judge, better practice would demand a pro forma order, filed after plaintiff's nonsuit, to the end that the dismissal may be reflected upon the minutes of the court.").

Evans v. Perkey,[34] the court of appeals held that the plaintiff's one-year period to refile following the voluntary nonsuit should be determined from the date on which the trial court actually entered an order in conformity with notice of dismissal previously filed by the plaintiff. The holding in *Evans* has been followed by the court of appeals on several other occasions in the same[35] and other contexts,[36] In *Parker v. Vanderbilt University*,[37] however, the court of appeals indicate that the dismissal becomes effective on "the date of the filing of the written notice of voluntary dismissal, not the entry of the confirmatory order"[38] for the purpose of determining the time within which a Rule 59[39] motion or a notice of

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[34] 647 S.W.2d 636, 641 (Tenn. App. E.S. 1982).

[35] *See, e.g., Lillard v. Pickney*, No. 04-A-01-9506-CV00268, 1995 Tenn. App. LEXIS 731, at [illegible] n.5, 1995 WL 636886, [illegible] (Tenn. App. M.S. Nov. 9, 1995) (dictum); Wynore v. Bikas, No. 01-A-01-0212-CV-00484, 1993 Tenn. App. LEXIS 312, at *3, 1993 WL 127030, at *2 (Tenn. App. W.S. at Nashville Apr. 23, 1993).

[36] *See, e.g.*, Maywood v. Norris, No. D1A01-CV-00179, 1997 Tenn. App. LEXIS 890, at [illegible], 1997 WL 764469, at *2-3 (Tenn. App. W.S. Dec. 17, 1997) (defendants' appeal from voluntary dismissal by plaintiff dismissed for lack of final judgment); Deaty v. [illegible], No. 0JA01-9211-CV-00417, 1993 Tenn. App. LEXIS 287, 1993 WL 119799 (Tenn. App. W.S. at Nashville Apr. 16, 1993) (in absence of entry of order of dismissal, trial court did not abuse its discretion in allowing plaintiff to withdraw an oral announcement of nonsuit in same proceeding in which it is made).

[37] 767 S.W.2d 412 (Tenn. App. M.S. 1988).

[38] *Id.* at 422 n.3.

[39] *See infra* § 12-2 (discussion of Rule 59 motions).

appeal is required to be filed.[40] An attorney must, therefore, assume that the earlier date is the date of dismissal whenever it is possible to refile an action within one year from that date.

Not surprisingly, parties and their attorneys often misconceive the extent of their right to take a voluntary nonsuit and either exercise the right after the time period has advanced beyond the savings statute or exercise the right in disregard of the only-two-dismissals-without-prejudice provision in Rule 41.01. For the litigant who finds herself in this position, the court of appeals opinion in *Algee v. State Farm General Insurance Company*[41] provides a narrow window of hope when the error is discovered immediately. In *Algee*, the plaintiffs, relying upon the one-year savings statute, took a voluntary nonsuit on May 13, 1992. In so doing, they apparently overlooked prior decisions establishing that the contractual one-year limitation provision in an insurance policy would not be

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[40] *See also* Vaughn v. Heinbach, No. 01A01-9504-PG-00147, 1995 Tenn. App. LEXIS 600, 1995 WL 546954 (Tenn. App. W.S. Sept. 13, 1995). In *Vaughn*, after first filing a petition in juvenile court for legitimation, Vaughn subsequently filed a petition for legitimation in probate court. On same day as the latter, he filed a motion to nonsuit the juvenile court proceeding, but no order was entered at that time. On motion by the mother's attorney, the probate court entered an order dismissing the legitimation proceeding apparently on the basis of the pending petition in juvenile court. While noting the holding in *Evans*, *Id.* at *8 n.3, 1995 WL at *3 n.3, the court of appeals in *Vaughn* concluded that the petition in the juvenile court "was effectively dismissed when counsel for Father provided a written notice of dismissal to the juvenile court." *Id.* at *9, 1995 WL at *3.

[41] 890 S.W.2d 445 (Tenn. App. W.S. 1994).

extended by the savings statute. On May 7, 1993, plaintiffs filed a motion to set aside the voluntary nonsuit.[42] Although the trial court granted the motion and reinstated the action, the court of appeals reversed. In so doing, the court first affirmed the discretion of the trial court to reinstate an action within thirty days after entry of a nonsuit. Because the dismissal had gone beyond the thirty days, however, the plaintiffs could obtain reinstatement only pursuant to Rule 60.02.[43] Because plaintiffs had failed to make a sufficient showing pursuant to Rule 60.02, the court erred in setting aside the judgment of dismissal.

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[42] The motion was apparently so characterized because of the Tennessee Supreme Court's decision on April 5, 1993 in Kee v. Sheiter Ins., 852 S.W.2d 226 (Tenn. 1993), holding that an amendment to the savings statute making it applicable in contractual time limitations could not be applied to contracts in existence at the time of its passage.

[43] *See infra* § 12-3 (discussing relief from judgment pursuant to Rule 60.02).

EXHIBIT "L"

Tennessee Bar JOURNAL

September/October 1993 **Vol. 23, No. 5**

* * *

Sex, Lies and Nonsuits

By Donald F. Paine

The first of these columns almost five years ago considered the interplay between nonsuits and the saving statute. We saw that misconceptions – a.k.a. lies – about nonsuits run rampant. Here are some more lies.

How many "free" nonsuits can a Tennessee lawyer take? Rule 41 says two, as only the third one is on the merits. Don't believe it; it's probably a lie. In most cases the second nonsuit operates as a bar. Here's why:

Let's say you file a personal injury complaint and summons when most lawyers do – a day or so before the one-year statute runs. Chances are the case isn't tried until months or years later. At trial all manner of calamities occur; witnesses won't tell the jury what they told you; demonstrations backfire, a cantankerous judge's rulings gave a common thread adverse to you. You announce the panacea: "Nonsuit, Your Honor."

You refile within the one-year saving period provided by T.C.A. §38-1-105. You go to trial again months and years after recommencement. Same song, second verse. The only difference is the judge's cantankerousness, now ratcheted up a notch. You take your second nonsuit.

Will you be able to get back into court? Yes, but only for a brief visit until the judge (same one) throws you out on motion.

The lesson is that, once you have nonsuited outside the original statute of limitations the saving statute starts running. Before that saving year expires, you must get your client's case properly filed in court – and you must stay there. Once you're outside the pale of both the statute of limitations and the saving statute, do not take a nonsuit! *See Reed v. Railroad,* 136 Tenn. 499 (1916), and *Payne v. Matthews,* 633 S.W.2d 494 (Tenn. App. 1982).

Donald R. Paine is a past president of the Tennessee Bar Association and a partner of the Knoxville firm of Paine, Swiney, and Tarwater. He was elected to membership in the American College of Trial Lawyers and the American Law Institute. He lectures for the Tennessee Law Institute, Crossley Bar Review and the Tennessee Judicial Conference. He is reporter to the Supreme Court's Advisory Commission on Civil Procedure.

EXHIBIT "M"

Tennessee Bar Journal

January/February 1989 Volume 25 Number 1

* * *

PAINE ON PROCEDURE

Nonsuits Don't Necessarily Save You

Donald F. Paine

* * *

Tennessee trial lawyers representing plaintiffs look upon the nonsuit as heavenly manna, and with justification. The state rule is far more liberal than the federal. Let's compare.

* * *

What if the applicable statute of limitations has run? Usually a wonderful statute saves our client's cause of action. It is, of course, the saving statute codified at TCA §28-1-105. (When I first encountered the saving statute in law school, I thought it dealt with banks.) The language is quaint, perhaps due to its eighteenth century North Carolina origins, but essentially we have only one year to get back in court for good by commencing a new action.

Supreme Court, U.S.
FILED

JUN 15 2001

OFFICE OF THE CLERK

No. 00-1810

In The

Supreme Court of the United States

WALTER JEFFERSON,

Petitioner,

vs.

CAPTAIN D'S RESTAURANT a/k/a SHONEY'S, Inc. and TPI RESTAURANTS, Inc.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee

RESPONSE TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

On June 5, 1992, the plaintiff, Walter Jefferson, filed a Complaint in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis naming Captain D's Restaurant a/k/a Shoney's, Inc. and TIP Restaurants, Inc. as co-defendants. (Complaint, filed June 5, 1992). In his Complaint, Mr. Jefferson alleged that he was injured when he slipped and fell on the premises of the defendants on July 18, 1991. (Complaint, filed June 5, 1992). On June 21, 1994, the Honorable George H. Brown, Jr., Shelby County Circuit Court, entered an Order of Dismissal Without Prejudice due to the plaintiff's failure to prosecute his claim. (Order of Dismissal, entered June 21, 1994).

On September 23, 1994, plaintiff timely filed his second Complaint in Shelby County Circuit Court in which he essentially repeated the allegations from the original Complaint. (Second Complaint, filed September 23, 1994). Almost three years later, on June 23, 1997, the Honorable Robert L. Childers, Shelby County Circuit Court, entered an Order of Non-Suit dismissing the second Complaint. (Order of Non-Suit, entered on June 23, 1997). On June 17, 1998, nearly seven years after the date of the alleged slip and fall, the plaintiff filed a third Complaint in Shelby County Circuit Court (the applicable statute of limitations for this type of action is one year). This third Complaint was subsequently dismissed on defendants' Motion for Summary Judgment, heard on August 19, 1999. Plaintiff appealed the trial court's ruling to the Tennessee Court of Appeals at Jackson, Tennessee. On August 16, 2000, the Tennessee Court of Appeals sitting at Jackson affirmed the trial court's decision. The Tennessee Supreme Court

denied plaintiff's application for certiorari. Plaintiff now seeks application for certiorari before this Honorable Court on the basis of a perceived denial of due process pursuant to the United States Constitution. Respondent respectfully disagrees that plaintiff has been denied due process or that his application before this Court is proper.

ARGUMENT

Considerations governing applications for certiorari before the Supreme Court are contained in Rule 10 of the Supreme Court Rules. A petition will be granted only for compelling reasons. Further, while not controlling, the character of the reasons are defined in three categories:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should

> be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In this case, plaintiff contends that he was denied due process because he was only allowed to file his suit two times instead of three. Plaintiff does not say whether the perceived denial of due process is procedural or substantive. However, it is clear that none of the criteria contained in Rule 10 of the Supreme Court Rules nor other compelling factors exist and Petitioner's application should be summarily denied.

Appellant contends that the trial court's dismissal of his lawsuit was in contradiction to Rule 41 of the Tennessee Rules of Civil Procedure which bars a cause of action only on the taking of a third voluntary dismissal. Appellant further asserts that there exists an irreconcilable conflict between Tennessee Code Annotated § 28-1-105 and Rule 41.01 of the Tennessee Rules of Civil Procedure. Respondent submits that this question has been entirely resolved by the Tennessee Courts and this appeal is wholly without merit. Tennessee Code Annotated § 28-1-105, commonly referred to as Tennessee's "saving statute," formerly Tennessee Code Annotated § 28-1-106, has been considered several times by the Tennessee courts. Any question that may have once existed regarding the interpretation of this statute has long been settled. See, *Reed v. Cincinnati, N.O. & T.P. Ry. Co.*, 190 S.W. 458 (1916); *Turner v. N.C. & St.L. Railway*, 285 S.W.2d 122 (1955); *Balsinger v. Gass*, 379 S.W.2d 800 (1964); *Payne v. Matthews*, 633 S.W.2d 494 (Tenn.App.1982).

As the Tennessee Supreme Court correctly pointed out more than eighty years ago, after the taking of any non-suit to an original cause of action, any subsequent suits must be filed within one year from the date of the first non-suit to be within the purview of the savings statute. *Reed v. Cincinnati, N. O. & T.P. Railroad Co.*, 190 S.W. 458 (1916). In *Reed v. Cincinnati*, this court rejected the position advanced by Appellant that the saving statute gives the plaintiff the right to file any number of successive suits upon the same cause of action as long as each new action was commenced within one year from the date of the previous non-suit. *Id.* In *Reed*, the Tennessee Supreme Court held that, in order to be within the statute of limitations, the new action must be brought within one year after the termination of an action which was commenced within the statute of limitations. 190 S.W. at 459.

Even more recently, in *Payne v. Matthews*, the Court of Appeals addressed whether a conflict exists between T.C.A. § 28-1-105 and Rule 41.01 of the Tennessee Rules of Civil Procedure. In *Payne*, appeal was taken by plaintiff from an order of the Circuit Court, Shelby County, Alan E. Highers, J., granting defendant's motion for summary judgment and dismissing suit for personal injuries and property damage. The Tennessee Court of Appeals, Tomlin, J., held that: (1) regardless of how an inconclusive dismissal is had, in order for a suit to survive, it must have been filed within one year of the date of dismissal of the original action, and (2) third suit for same cause of action, filed more than one year after date of entry of order of dismissal for want of prosecution of first action, was properly dismissed notwithstanding

plaintiff had taken a voluntary non-suit in a second action filed within one year of date of dismissal. Even more specifically, the perceived conflict noted by plaintiff is resolved in *Payne* as follows: Tennessee Code Annotated § 28-1-105 addresses itself to *time* while Rule 41.01 of the Tennessee Rules of Civil Procedure addresses itself to *the number* of dismissals (non-suits) that can be taken. *Payne v. Matthews*, 633 S.W.2d at 495-496.

In this case, the plaintiff concedes that his case was not timely filed the *third* time. Further, the plaintiff's contention that an "average reasonable attorney" wouldn't properly understand the synthesis of the statute and rules of procedure is without merit. If plaintiff had consulted the cited treatises written by Professors Banks and Entman (*Tennessee Civil Procedure*, Section 9-29(b) 648 (1999)) and Donald Payne (*Sex, Lies and Nonsuits*), 29 Tenn. Bar Jour., No. 5; 17 (1993), perhaps he would have not voluntarily taken the second non-suit. The statutes and rules were available to counsel at all time. Claiming that he should not be responsible for acclimating himself to those statutes and rules is extremely reckless conduct. Further, to in any way intimate that plaintiff was denied any due process for not following a statute long in existence or not being able to proceed a third time on a lawsuit dismissed twice previously, is nothing short of ridiculous. Plaintiff cites to no authority even tangentially connecting the instant situation to precedent in this court or any other.

CONCLUSION

Based on the clear and indisputable facts and applicable case law, the trial court's award of summary judgment and subsequent affirmation by the appellate courts was not only proper, but mandated. The plaintiff, on his own accord, is the author of his own misfortune. Plaintiff's application for certiorari before this Court should be denied.

Respectfully submitted,

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